2006

Roger Bryner v. Cohne Rappaport and Segal Emily Smoak, Howard Lundgren : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS
STATE OF UTAH

ROGER BRYNER Plaintiff and Appellant	)	BRIEF OF THE APPEALLANT
vs.	)	20060731
Cohne Rappaport and Segal Emily Smoak Defendants and Appeallees	)	Case #~~20070163~~ Trial No. 060417519 Judge Timothy Hansen

AN APPEAL FROM AN ORDER AND JUDGMENT GRANTING DEFENDANTS MOTION FOR ATTORNEYS FEES ON DISMISSAL UNDER RULE 12 IN THE THIRD DISTRICT COURT, COUNTY OF SALT LAKE

(1) PARTIES

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(2)Table of Contents

(3) Table of Authorities

(4) Jurisdiction

This Court has jurisdiction pursuant to Utah Code Ann. §78-2(a)-3 (2)(j). which states "(2) The Court of Appeals has appellate jurisdiction. including jurisdiction of interlocutory appeals. over: .... (j) cases transferred to the Court of Appeals from the Supreme Court."

(5) Issues for Review with citation to standard of review and preservation of the issue in the record.

This is an appeal of the award of attorneys fees only, not of dismissal. Plaintiff and Appellant does not wish to challenge dismissal or further pursue the factual basis of the underlying cause of action for abuse of process, nor to argue the propriety of dismissal but only attorneys fees. As the fees will be repaid less than $0.02 on the dollar in bankruptcy court, the amounts they have already collected are being forced to be disgorged by them, and the issues in this case which led to the good faith commencement of litigation have become moot. As a result I have spent only a couple hours producing this brief and do not wish to raise a lot of issues when I am winning in federal court. I also have not waived the bankruptcy stay, and object to any further proceedings in this court without the permission of federal court.

5.1 Did the court improperly consider material outside the briefs in a motion under Rule 12(b) without notice in awarding attorneys fees?

The standard of review for this issue is quoted in Tuttle vs. Olds, 2007 UT App 10, at ¶6 and ¶8:

> ¶6 Plaintiffs claim that the trial court's reference to the motion as one for judgment on the pleadings, as well as its failures to exclude matters outside the pleadings and to properly convert the motion into one for summary judgment, warrant reversal. See Utah R. Civ. P. 12(b)-(c). "If a court does not exclude material outside the pleadings and fails to convert a rule 12(b)(6) motion to one for summary judgment, it is reversible error unless the dismissal can be justified without considering the outside documents." Oakwood Vill., L.L.C. v.

> Albertsons, Inc., 2004 UT 101,¶12, 104 P.3d 1226. The propriety of a dismissal under rule 12(b)(6) is a question of law we review for correctness. See Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996). Rule 12(b)(6) dismissals are appropriate only where the court concludes that the plaintiff has failed to state a claim upon which relief can be granted, after accepting all the factual allegations made in the complaint as true and drawing all reasonable inferences in a light most favorable to the plaintiff. See id.
>
> ¶8 Plaintiffs claim that, in dismissing the case, the trial court improperly considered material outside the pleadings. If a court considers material outside the pleadings in deciding a rule 12(b)(6) motion to dismiss, the court must convert the motion into one for summary judgment. See Utah R. Civ. P. 12(b). This rule 12(b) conversion process includes giving the parties reasonable notice and opportunity to submit all pertinent summary judgment materials for the court's consideration. See id.; Hebertson v. Willowcreek Plaza, 923 P.2d 1389, 1391 (Utah 1996); Strand v. Associated Students of Univ. of Utah , 561 P.2d 191, 193 (Utah 1977). The notice and opportunity to submit requirements are especially important with respect to the party against whom judgment is entered. See Strand, 561 P.2d at 193 (stating that the opportunity for the non-moving party to submit rule 56 material is particularly important). Our rules provide that complaints and answers constitute pleadings. See Utah R. Civ. P. 7(a) (including replies to counterclaims and answers to crossclaims, as well as third-party complaints and answers, within the definition of pleadings). A matter outside the pleadings "include[s] any written or oral evidence . . . which . . . substantiat[es] . . . and does not merely reiterate what is said in the pleadings." Oakwood Vill., 2004 UT 101 at ¶12 (second, third, and fourth alterations in original) (quotations and citation omitted).

This issue was preserved by way of an order in the trial court by way of an objection to proceeding under Rule 56 to considering affidavits or exhibits. The court then verbally ordered that the motion of Defendants would not be converted under Rule 56, however

the court then proceed to grant an award of attorneys fees under Rule 56 by referencing material outside the pleadings.

5.2 Was an award of attorney's fees appropriate given the court must make factual inferences in favor of Plaintiff, not Defendant.

The standard of review is found in To quote Mackey v. Cannon, 2000 UT APP 36, 996 P.2d 1081 which states:

> When reviewing a motion to dismiss based on Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims. Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 742, 744 (Utah Ct. App. 1992). "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990). Additionally, we "must consider all the reasonable inferences to be drawn from the facts in a light most favorable to the plaintiff." Anderson, 841 P.2d at 744. "The propriety of a trial court's decision to grant or deny a motion to dismiss under rule 12(b)(6) is a question of law that we review for correctness." Cruz, 909 P.2d at 1253.

This issue was preserved by way of proffering the relevant facts at R. 783 and 786 and the affidavit at R. 180-182.

(6)Citations to determinative law.

Johnson v. Hermes 2005 UT 82

> ¶2 When reviewing a rule 56(c) motion for summary judgment, we recite the facts in the light most favorable to the non-moving party. See Woodbury Amsource, Inc. v. Salt Lake County, 2003 UT 28, ¶ 4, 73 P.3d 362. Thus, in reviewing these facts, we present them in a light most favorable to Appellant Hermes, the commercial developer in this case.

Mackey v. Cannon. 2000 UT APP 36

> When reviewing a motion to dismiss based on Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims. Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 742, 744 (Utah Ct. App. 1992). "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990). Additionally, we "must consider all the reasonable inferences to be drawn from the facts in a light most favorable to the plaintiff." Anderson, 841 P.2d at 744. "The propriety of a trial court's decision to grant or deny a motion to dismiss under rule 12(b)(6) is a question of law that we review for correctness." Cruz, 909 P.2d at 1253.

Rule 12(b) and (c)

> (b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.
>
> (c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the

court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Tuttle vs. Olds, 2007 UT App 10

¶6 Plaintiffs claim that the trial court's reference to the motion as one for judgment on the pleadings, as well as its failures to exclude matters outside the pleadings and to properly convert the motion into one for summary judgment, warrant reversal. See Utah R. Civ. P. 12(b)-(c). "If a court does not exclude material outside the pleadings and fails to convert a rule 12(b)(6) motion to one for summary judgment, it is reversible error unless the dismissal can be justified without considering the outside documents." Oakwood Vill., L.L.C. v. Albertsons, Inc., 2004 UT 101,¶12, 104 P.3d 1226. The propriety of a dismissal under rule 12(b)(6) is a question of law we review for correctness. See Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996). Rule 12(b)(6) dismissals are appropriate only where the court concludes that the plaintiff has failed to state a claim upon which relief can be granted, after accepting all the factual allegations made in the complaint as true and drawing all reasonable inferences in a light most favorable to the plaintiff. See id.

¶7 Plaintiffs claim that the trial court should be reversed for treating Defendants' rule 12(b)(6) motion to dismiss as a rule 12(c) motion for judgment on the pleadings. See Utah R. Civ. P. 12(c). In its order granting the motion, the trial court referred to the motion as one for a judgment on the pleadings, despite a reminder from Defendants that their motion was one to dismiss under 12(b)(6). Because Defendants never filed an answer to the complaint, the pleadings were not closed at the time the trial court granted the so-called judgment on the pleadings. A motion for a judgment on the pleadings cannot be made, let alone granted, prior to the closing of the pleadings. See id. (stating that 12(c) motions are to be made after the pleadings have been closed). We will therefore review the trial court's decision as if it had correctly referred to the granted motion as one for dismissal under rule 12(b)(6).1

¶8 Plaintiffs claim that, in dismissing the case, the trial court improperly considered material outside the pleadings. If a

court considers material outside the pleadings in deciding a rule 12(b)(6) motion to dismiss, the court must convert the motion into one for summary judgment. See Utah R. Civ. P. 12(b). This rule 12(b) conversion process includes giving the parties reasonable notice and opportunity to submit all pertinent summary judgment materials for the court's consideration. See id.; Hebertson v. Willowcreek Plaza, 923 P.2d 1389, 1391 (Utah 1996); Strand v. Associated Students of Univ. of Utah, 561 P.2d 191, 193 (Utah 1977). The notice and opportunity to submit requirements are especially important with respect to the party against whom judgment is entered. See Strand, 561 P.2d at 193 (stating that the opportunity for the non-moving party to submit rule 56 material is particularly important). Our rules provide that complaints and answers constitute pleadings. See Utah R. Civ. P. 7(a) (including replies to counterclaims and answers to crossclaims, as well as third-party complaints and answers, within the definition of pleadings). A matter outside the pleadings "include[s] any written or oral evidence . . . which . . . substantiat[es] . . . and does not merely reiterate what is said in the pleadings." Oakwood Vill., 2004 UT 101 at ¶12 (second, third, and fourth alterations in original) (quotations and citation omitted).

(7) Statement of the Case.

1) Plaintiff brought an action against Defendants for violation of Rule 5 and abuse of process by failing to serving him in a case where he appeared pro-se. and instead serving no less than 3 attorneys who had appeared in other unrelated cases.

2) Plaintiff failed to correctly prepare his complaint and made arguments of law in an unskilled way. without knowledge of or correctly citing abuse of process case law. See R. 27-30.

3) Defendants moved for dismissal without filing an answer under both rule 12 and rule 56. See R. 80-81.

4) Plaintiff objected to proceeding under Rule 56. The court ruled it would not convert the case under Rule 56 but hear it strictly as a motion under Rule 12. See R. 772.

5) The court granted the Defendants motion to dismiss based upon Rule 12. but then considered material outside the pleadings. and in the Defendant's affidavits supporting it's motion to dismiss. in granting attorney's fees See R. 52.

6) The court did not consider any of Plaintiff's affidavits nor give them deference under Rule 56. but entered the proposed findings of fact and law which contradicted the pleadings and affidavits of Plaintiff. See R 47 and 51 as well as R. 180-181.

(8) Summary of arguments:

8.1 Summary of Argument that the court improperly consider material outside the briefs in a motion under Rule 12(b) without notice in awarding attorneys fees?

The court explicitly ruled that it would not consider Plaintiff's affidavit as he objected to proceeding under Rule 12(b), but then proceeded to consider material outside the pleadings in granting attorneys fees

8.2 Summary of argument on the award of attorney's fees was not appropriate given the court must make factual inferences in favor of Plaintiff.

The standard of law is clear. In a motion to dismiss, the court must make all factual inferences in favor of the non-moving party. Yet the Court took the proffer of an opposing attorney as to the mental state of Plaintiff and ignored the factual statements by Plaintiff that he was only trying to correct abusive behavior by Defendants by compelling them to comply with Rule 5. No due process in cross examining the affidavit of Ms. Smoak was allowed, and no evidence was before the court.

(9) Argument.

9.1 Did the court improperly consider material outside the briefs in a motion under Rule 12(b) without notice in awarding attorneys fees?

The record on this issue is clear. The court stated that it would treat the motion to dismiss as one under Rule 12(b) for failure to state a claim. See Transcript of may 22nd 2006 page 37 l. 13. also included as a copy of the Record at page 772. Plaintiff was prevented from cross examining Ms. Smoak to determine if her Exhibit C was attached to another letter that clearly stated "do not contact me about cases I have not appeared in." If allowed to present testimony before the Court. Plaintiff could have demonstrated that Ms. Smoak was intentionally abusing process. However as the case was not converted under Rule 56. and no evidence whatsoever was presented to the court. this was not possible.

If a court considers material outside the pleadings in deciding a rule 12(b)(6) motion to dismiss. the court must convert the motion into one for summary judgment. See Utah R. Civ. P. 12(b). This rule 12(b) conversion process includes giving the parties reasonable notice and opportunity to submit all pertinent summary judgment materials for the court's consideration. See id.: Hebertson v. Willowcreek Plaza. 923 P.2d 1389. 1391 (Utah 1996). Strand v. Associated Students of Univ. of Utah . 561 P.2d 191. 193 (Utah 1977) The notice and opportunity to submit requirements are especially important with respect to the party against whom judgment is entered. See Strand. 561 P.2d at 193 (stating that the opportunity for the non-moving party to submit rule 56 material is

particularly important). Our rules provide that complaints and answers constitute pleadings. See Utah R. Civ. P. 7(a) (including replies to counterclaims and answers to crossclaims, as well as third-party complaints and answers, within the definition of pleadings). A matter outside the pleadings "include[s] any written or oral evidence . . . which . . .substantiat[es] . . . and does not merely reiterate what is said in the pleadings." Oakwood Vill., 2004 UT 101 at ¶12 (second, third, and fourth alterations in original) (quotations and citation omitted).

The Judge clearly considered material outside of the pleadings in the hearing, including proffers of evidence from counsel for Defendant. By not taking Plaintiff's version of the facts at face value, and deciding on the merits against Plaintiff's version of events, the Court improperly granted summary disposition without notice to even allow refuting testimony, affidavits, and arguments of law. For this reason the error should be reversed and the case remanded.

9.2 Was an award of attorney's fees appropriate given the court must make factual inferences in favor of Plaintiff, not Defendant.

The standard of review is found in To quote Mackey v. Cannon, 2000 UT APP 36, 996 P.2d 1081 which states:

> When reviewing a motion to dismiss based on Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims. Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 742, 744 (Utah Ct. App. 1992). "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." Colman v.

> Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990). Additionally, we "must consider all the reasonable inferences to be drawn from the facts in a light most favorable to the plaintiff." Anderson, 841 P.2d at 744. "The propriety of a trial court's decision to grant or deny a motion to dismiss under rule 12(b)(6) is a question of law that we review for correctness." Cruz, 909 P.2d at 1253.

The court ignored the proffers of Plaintiff proffer of evidence found at

Plaintiff was cut off mid sentence and not allowed to cross examine, testify about the issues, or cross examine the author of the affidavit. Under such circumstances, where a legitimate dispute of fact exists, it is an error to find against the statements made by Plaintiff without due process.

The only motive for filing the suit was to compel compliance with an order of the Supreme Court, Rule 5, and to prevent service of pleadings from being used as a method of harassment.

Plaintiff stated in open court and all of his pleadings and affidavits that his good faith reason for bringing the action was to try and gain compliance with Rule 5, and that after bringing the action that defendants actually stopped afterwards and were in fact ordered to obey Rule 5 in the action in another action, and that he believed that the attorneys who had billed him for the abusive service were entitled to do so. See Transcript p. 48 l. 11-25 and page 51 l. 1-7 and Record on appeal at 783. The Court proceeded to consider an attachment to the affidavit in support of motion for summary disposition and awarded attorney's fees. See Transcript p. 53 l. 15-17 and record on appeal at R. 788. See also affidavit in question at R. 95-117. There is nowhere else

where the supposed communication, which should not have been considered, was mentioned.

The sworn testimony of Plaintiff is found at R. 180-182. The court ignored any testimony found in this document, and made specific findings of fact in it's order on the motion to dismiss which contradicted the testimony in this affidavit. While the court has considerable discretion to judge the credibility of witnesses and weight the facts in a motion to dismiss filed after pleadings are closed, and upon proper notice under Rule 56, it is patently unfair to impose the same latitude on a Rule 12(b) motion.

The court should reverse and remand the issue of attorney's fees as no bad faith was involved, and allow either testimony under oath with cross examination or alternately grant full faith and deference to the affidavits of Plaintiff on summary judgment.

(10) Relief Sought

10.1 Petitioner asks that the Court of Appeals reverse the award of attorneys fees as entered improperly considering and giving deference to Defendants without presentation of sworn testimony and without giving full deference to Plaintiff's affidavits.

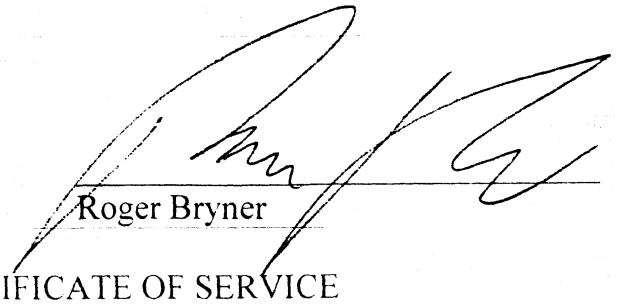
(11) Section 11, record sections index

A) Record pages 180-182, affidavit of Plaintiff.

B) Record pages 772, 783, 786 and 787, cited transcript pages.

Signature and certificate of service

Dated this 13th day of March, 2008



Roger Bryner

CERTIFICATE OF SERVICE

I certify that on the 13th day of March, 2008, I did cause to be delivered by U.S. Mail postage prepaid and by hand delivery the forgoing document to the following persons:

Attorneys for Defendants and Appeallees
Cohne, Rappaport and Segal
257 E 200 S, Suite 700
Box 11008
SLC, UT 84147-0008
By Fax 801-364-3002
By Email emily@crslaw.com

Original +7 copies
Mail
Court of Appeals
450 South State Street
PO 140230
Salt Lake City, UT 84114-0230

Exhibit A

06 MAR 20 PM 3:42

BY ORIGINAL

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ROGER BRYNER Plaintiff. vs. EMILY SMOAK COHNE RAPPAPORT AND SEGAL Defendants	AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT Case No. 050922650 MP Judge Hanson

Plaintiff swears that the following are true statements:

1) Joe Orifici did not represent Plaintiff in case #050916389.

2) Steven Russell did not represent Plaintiff in case #050916389.

3) Jared Coleman did not represent Plaintiff in case #050916389.

4) Kim Luhn did not represent Plaintiff in case #050916389.

5) I filed case #050916389 representing that he was pro-se to Svetlana Bryner. Emily's client. in the documents served upon her.

6) Kathy Arnovick represented Plaintiff in case #050916389 only from the time of filing of her appearance to the time of filing of her withdrawal

7) Emily Smoak was notified by Steven Russell that he would not be representing Plaintiff in case #050916389 prior to Emily's filings.

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8) Emily Smoak was notified by Joe Orifici that he would not be representing Plaintiff in case #050916389 prior to Emily's filings.

9) Emily Smoak was notified by Jared Coleman that he would not be representing Plaintiff in case #050916389.

10) Kim Luhn, due to conflict, could not represent either party in case #050916389.

11) Rule 5 of the Utah Rules of Civil Procedure is not an optional suggestion, and that all in the Court have a duty to follow it.

12) I believe Emily Smoak breached her duty by not mailing pleadings to Petitioner or his attorney of record at all.

13) I believe that in order to harass Plaintiff, Emily Smoak mailed pleadings to a large number of 3rd parties. These pleadings were mailed to third parties, not in care of them in order to run up attorney's fees.

14) No reason to send pleadings in care of anyone existed as Plaintiff's address was fully disclosed.

15) I suffered attorney's fees as a result of this outrageous behavior

16) I believe that Defendants were unjustly enriched by these actions.

17) I was unjustly deprived by these actions, through the attorneys fees.

18) I believe that the linkage between 16 and 17 is case #050916389

19) I swear that Plaintiff's amended pleading is incorporated herein under Rule 10(c) of the Rules of Civil Procedure is true.

Dated this 17th day of March 2006,

Roger Bryner

Roger Bryner, Plaintiff pro se.

CERTIFICATION (to be signed at filing)

I Roger Bryner swear that the preceding "AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT" is true to the best of my knowledge, information and belief.

Roger Bryner

Subscribed and Sworn this ___ Day of March, 2006

(Court Clerk)

STATE OF UTAH THIRD DISTRICT SALT LAKE

CERTIFICATE OF SERVICE

I certify that on the 17th day of March, 2006, I did cause to be delivered by facsimile, the forgoing document to the following persons:

JEFFREY L SILVESTRINI,
Registered agent for 680028-0144
Cohne Rappaport and Segal, P.C.
257 E 200 S. Suite 700
Box 11008
SLC, UT 84147-0008
By Fax 801-355-1813
By Email jeff@crslaw.com

Emily BroadHead Smoat and
A. Howard Lundgren
Cohne, Rappaport & Segal, P.C.
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SLC, UT 84147-0008
By Fax 801-364-3002
By Email emily@crslaw.com

Roger Bryner

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Exhibit B

raised there?

THE COURT: No, he gets the first and last say because he is the mover.

MR. BRYNER: Okay.

THE COURT: I think I am prepared to rule on this motion to dismiss. The motion to dismiss unless the Court otherwise orders and the parties agree and I have not ordered and the parties did not, well, I don't know if the parties agree or not, but I am not going to treat this as a motion for summary judgment. I'll treat it strictly as a motion to dismiss under Rule 12(b) failure to state a claim. And, the first cause of action is a cause of action with expelled strict tort. Now, I understand that Mr. Bryner is Pro Se and there might be some confusion about the proper words to use here, but if I just assumed that this is tort or negligence case then, and the sub, some of the substance of Mr. Bryner's claim is that Ms. Smoak sent some pleadings to his lawyers in other cases albeit as I understand it involved really the same people, but was thought to be divorce case and some other things with other lawyers involved. But, her serving the notice of this request for hearing

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What a horrendous waste of resources. You ought to be fighting the cases that mean something. At the very least it cost you $104.75 to file this little gem.

MR. BRYNER: I'd point out the attorney fees from Joe Orifici alone are $200 and you know, all added together total--

THE COURT: I don't know how those lawyers could charge you on a case where they don't represent you.

MR. BRYNER: I thought they could, that was my good-faith understanding of it. I thought they had every right to, I mean, certainly if, I would have if I was a lawyer. So, I think in that, in that event if that is really the truth then that, they cannot, I mean I guess I'd have a hard time adjudicating that right now because you've basically said that they don't owe me fees and they are not even here to represent themselves. So I don't know how we can make that determination, but I guess that is my thought there is, I certainly thought they had every right to bill me and I don't know that wouldn't argue but they do, if they were here to defend themselves. I think that is actually something

the only reason that I, if you were a lawyer standing here, you know, I'd chop you off at the heels because lawyers are supposed to know better. But what you are telling me is the reason you filed this action is you thought you were legally obligated to these attorney's fees.

MR. BRYNER: That's correct.

THE COURT: Okay, thank you. Anything else Mr. Lundgren?

MR. LUNDGREN: (Inaudible) and Mr. Bryner and our law firm has spoke but the affidavit that we filed in support of the motion for attorney's fees does include the correspondence which really created all the confusion and I'll just read it to you, Your Honor. This is from Mr. Bryner to his three attorneys and it's dated September 30, 2005, regarding all communications through Jared. It is asking Jared for extensions on Steve's filings and representing to Steve communications between myself and Jared, still refuses to schedule depositions. Shut this down. Clearly such behavior is absurd and inappropriate, therefore I am instructing Steve and Joe to ignore all further letters from opposing counsel. Steve and Joe are

not authorized to respond directly to Emily. Cease communication with her. Jared, send Emily a copy of this letter and letter from you confirming this policy. All agreements must be run through Jared and me as well. From now on if my response to Emily requires no counsel I will respond directly. If it does, Jared will coordinate the response after checking with the right counsel. Emily should send all communication by fax and if it is a pleading follow up with a mailed copy to Jerold and Joe and Steve as required. Hand-delivery must be to all three attorneys as well but this is only under Rule 5 and not for letters. Mr. Bryner was directing all communication to go through his attorneys.

And he then complains that he did not get the communication he needed but he still appeared. Here we are spending an hour of the Court's time plus all the time we have spent to prepare for this, substantial pleadings have been prepared in connection with this all because Mr. Bryner didn't like that Emily Smoak represented Svetlana Bryner and that is what this is all about. His conduct is in bad faith. His statements and argument to Your Honor reflect this

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